INDEX.

Page

Motion to be permitted to file petition for writ of habeas corpus 1
Petition for writ of habeas corpus 3
Statement as to jurisdiction 40

Table of Cases.

Achtien v. Dowd, 117 Fed. 2nd 989 20
Dickson v. Pruitt, 42 Nev. 345 17
Dowd v. Superior Court of LaPorte County, 36 N. E. 2nd 765 ..... 40, 42
Hudgings, ex parte, 249 U. S. 378 41
Hunter v. Cleveland, etc., 202 Ind. 328 24
Indianapolis St. Ry. Company v. Taylor, 39 Ind. App. 592 24
Johnson v. Zerbst, 304 U. S. 458 ..... 17, 41
Jones v. Dowd, 73 N. E. 2nd (Ind.) 68..... 42
Kunkel, State ex rel. v. Circuit Court of LaPorte County, 209 Ind. 682 .....21, 27, 42
Mooney v. Holohan, 294 U. S. 103 18
Moore v. Dempsey, 261 U. S. 86 41
O'Leary State ex rel. v. Dowd, 37 N. E. 2nd Ind. 61 42
Pease v. State, 74 Ind. App. 572 16
People v. Brewer, 328 Ill. 472 16
Powell v. Alabama, 287 U. S. 45 ..... 17, 41
Quinn v. State, 209 Ind. 316 25
Robertson v. State, 109 Ind. 79 16
Shipley v. State, 210 Ind. 253 25
Smith v. O'Grady (U. S., 1941), 61 Sup. Ct. 572 ..... 17, 18, 41

Springer v. Shavender, 118 N. C. 33 17
Swain v. Dowd, 215 U. S. 256 ..... 27, 42
Willets v. Ridgeway, 9 Ind. 397 ..... 24, 25

Statutes and Other References.

Burns Ann. Stat. (1933) (Ind.), Sec. 3, 1901.... 18
Const. of Ind., Art. 1, Sec. 27 18
Const. of U. S., Art. 6, Sec. 2 ..... 18, 19
49 Corpus Juris, page 180 17
U. S. C. A. Title 28, Sec. 451, 452, 453.....29, 40, 41

In The

Supreme Court of the United States

No. . . . . .

JOHN BOTWINSKI,

Petitioner,

v.

ALFRED F. DOWD, as Warden of the Indiana State Prison; and THE STATE OF INDIANA,

Respondents.

MOTION TO BE PERMITTED TO FILE PETITION FOR WRIT OF HABEAS CORPUS.

Comes now the petitioner and moves the court to be permitted to file a petition for a writ of habeas corpus, and that an order be entered against the respondents for rule to show cause why the motion should not be granted.

OSCAR B. THIEL,
Attorney for Petitioner.

In The

Supreme Court of the United States

No. . . . . .

JOHN BOTWINSKI,

Petitioner,

v.

ALFRED F. DOWD, as Warden of the Indiana State Prison; THE STATE OF INDIANA,

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associated Justices of the Supreme Court of the United States:

Your petitioner, John Botwinski, would most respectfully represent:

I.

That the petitioner herein is now confined in the Indiana State Prison at Michigan City, Indiana, and has been so confined since the 27th day of January, 1938.

II.

That previous to said confinement your petitioner was a citizen of the United States residing in East Chicago, Indiana.

III.

That the sole claim and authority by virtue of which the respondent as warden of the Indiana State Prison restrains and detains your petitioner of his liberty is by a commitment issued and based upon a judgment purported to have been issued by the Jasper Circuit Court and entered on the 27th day of January, 1938, in which said Jasper Circuit Court and the judge thereof purported to find your petitioner guilty of the crime of bank robbery upon an affidavit theretofore filed in the said Jasper Circuit Court, and upon which said finding of guilty the judge of the Jasper Circuit Court purported to sentence your petitioner for a period of sixty-five (65) years in the Indiana State Prison at Michigan City, Indiana; that pursuant to a commitment issued thereon, your petitioner was delivered into the custody of the respondent where he is now restrained of his liberty in the Indiana State Prison.

IV.

Your petitioner says that said judgment of conviction is void and that the commitment issued thereon is void for the following reasons:

a. That your petitioner was arrested on the 22nd day of January, 1938, in the City of Chicago, Illinois, and im-

mediately thereafter was brought from the said City of Chicago, Illinois, to the City of Hammond, Indiana.

b. That upon being placed in the city jail in Hammond, Indiana, your petitioner requested the said jailer to give him time to confer with an attorney and informed the said jailer that he had a brother-in-law living in East Chicago, Indiana, who would get in touch with his attorney for him.

c. That before being given an opportunity to confer with any attorney, your petitioner was taken from the said city jail in Hammond, Indiana, to the Jasper County Court House in Rensselaer, Indiana, and was by the court required to plead to the charge then filed against him.

d. Your petitioner says that upon being brought into the Jasper Circuit Court he informed the court that he had an attorney coming from Chicago and he would like to have time to confer with said attorney before entering his plea therein, but that he was not given any opportunity by the court to confer with any attorney.

e. Your petitioner further says that neither the court nor the prosecuting attorney advised your petitioner of the nature of the charge filed against him or the punishment that might be imposed therefor, and that he was not informed by the court of his right to have counsel for his defense, and of his right to a trial by jury, and of his right not to give testimony against himself, and that the said Jasper Circuit Court and the prosecuting attorney in the said Jasper Circuit Court entirely failed to advise your petitioner of any of his constitutional rights.

V.

Your petitioner further says that he had no legal education whatever; that the extent of his education was a second grade education in the Wisconsin public schools; that he could read and write but that he had no legal experience and was unable to protect his rights in any legal proceeding.

VI.

That the father of your petitioner lives and at the time lived in Dancy, Wisconsin, approximately four hundred (400) miles from the place where the charges were filed against your petitioner, and that your petitioner was unable to get into communication with his father before the proceedings held in the Jasper Circuit Court.

VII.

Your petitioner further says that he was induced to enter a plea of guilty by the promises and representations of the Indiana State Police who had caused his arrest and who had brought him to Rensselaer, Indiana, that if he would enter a plea of guilty he would get a maximum sentence of not more than ten (10) years and might even be given a suspended sentence because he had no previous prison record of any kind.

VIII.

Your petitioner says that he entered said plea of guilty upon the said misrepresentations made to him by the respondent, the State of Indiana by and through its State

Police officers that the maximum sentence that might be imposed would be ten years and that he would be given a suspended sentence; that he was alone, away from friends and no one with whom he could advise; that he had hoped for aid and assistance from a brother-in-law, James Milinare, but did not know whether or not the same would be given; that he was not guilty of the crime with which he was charged, but believed that he could not make his defense on account of his ignorance of the law, and his inability to obtain counsel.

IX.

Your petitioner further says that he was induced to enter a plea of guilty by the further misrepresentation of the State Police Officer of the respondent, the State of Indiana, who represented to your petitioner that he had talked with the Prosecuting Attorney of Jasper County, Indiana, and that if a plea of guilty were entered, they would treat him leniently, and that he would undoubtedly get a suspended sentence; and petitioner says that when he was brought into the Jasper Circuit Court, the Prosecuting Attorney, representing the respondent, the State of Indiana, informed the court that petitioner was not supposed to have any lawyer and that he would enter a plea of guilty.

X.

Your petitioner would further represent that he was induced to enter a plea of guilty by the presence in the Jasper Circuit Court of the respondent, the State of Indiana, of several state troopers, all fully armed, and that your petitioner was ignorant of his rights under the Constitution of the United States, and particularly under

Article XIV of the Amendments thereto; and being in fear of his safety and his life, entered said purported plea of guilty.

XI.

Your petitioner further says that after he was so brought into court, and after his plea had been entered, the brother-in-law of your petitioner appeared in the Jasper Circuit Court together with one Ettore Farreri, an attorney of Chicago, Illinois, and that they asked the court for permission to confer with your petitioner, which permission was by the court at the time denied.

XII.

That after the hearing of the case was concluded, the court permitted your petitioner to confer with Mr. Ettore Farreri but that the court refused to recognize said Ettore Farreri as an attorney for your petitioner.

XIII.

That immediately after said conference, the said Ettore Farreri on behalf of your petitioner asked the court to be permitted to withdraw the plea of guilty entered by your petitioner and to enter a plea of not guilty but that said request was by the court denied.

XIV.

Your petitioner further says that the Jasper Circuit Court refused to permit your petitioner to confer with any attorney prior to his plea and to the purported hear-

ing and trial, and denied your petitioner any opportunity to confer either with an attorney selected by your petitioner or with any attorney appointed by the court, and that he was compelled to submit to judgment and sentence without any time to prepare for any hearing, without advice of counsel, without being informed of his right to counsel, and with counsel having been specifically denied to your petitioner.

XV.

Your petitioner says that all of said acts of the Jasper Circuit Court were in violation of the rights of your petitioner as guaranteed to your petitioner under the Constitution of the State of Indiana, and particularly under Sections 13 and 14 of Article I of said Constitution of the State of Indiana, and that he is now being detained and deprived of his liberty in violation of the 14th Amendment to the Constitution of the United States in that all of the proceedings hereinabove set out were without due process of law, and that the action of the court in so pretending to give your petitioner a hearing and issuing a commitment on said pretended hearing is depriving your petitioner of his liberty without due process of law, and that the respondent herein in response to said commitment so issued by the Jasper Circuit Court is depriving your petitioner of his liberty without due process of law.

XVI.

Your petitioner further says that on the 23rd day of April, 1941; your petitioner filed in the LaPorte Superior Court of the State of Indiana his petition for a writ of Habeas Corpus against the respondent, Alfred F. Dowd, as warden of the Indiana State Prison, alleging the same

facts and circumstances as are alleged in paragraphs I to VII and XI to XV herein, a copy of which petition is hereto attached and for identification marked, "Petitioner's Exhibit A"; that such proceedings were had thereon that a hearing on said petition was begun in said LaPorte Superior Court on the 2nd day of June, 1941; that at the conclusion of the evidence on said 2nd day of June, 1941, said cause was continued for argument and finding until the 16th day of June, 1941.

XVII.

Petitioner says that thereafter, on the 10th day of June, 1941, the respondent herein, Alfred F. Dowd, as warden of the Indiana State Prison, filed, as a relator, in the Supreme Court of the State of Indiana his original petition for writ of prohibition, naming as sole respondent thereto, THE LaPORTE SUPERIOR COURT OF LaPORTE COUNTY, INDIANA; JAMES F. GLEASON, JR., AS SPECIAL JUDGE OF THE LaPORTE SUPERIOR COURT OF LaPORTE COUNTY, INDIANA; and that your petitioner was not made a party to said petition for said writ of prohibition or to said cause of action in the Supreme Court of Indiana, said cause being cause number 27568 in the Supreme Court of Indiana.

XVIII.

Your petitioner further says that in said petition for writ of prohibition, the said Alfred F. Dowd, as warden, etc., alleged that this petitioner had filed his petition for writ of habeas corpus, identical with Petitioner's Exhibit A herein; and also alleged *inter alia* that he, the said respondent herein, had filed a return in the said LaPorte

Superior Court showing that he held your petitioner by virtue of a valid commitment in due form, based on a valid judgment of the Jasper Circuit Court of Jasper County, Indiana, a copy of which return is hereto attached and for identification marked, "Petitioner's Exhibit B."

XIX.

Petitioner says that on the basis of said petition for writ of prohibition the Supreme Court of Indiana on the 10th day of June, 1941, issued its temporary writ of prohibition in the following words and figures:

"In the Supreme Court of Indiana.

"State of Indiana, on the relation of Alfred F. Dowd, as Warden of the Indiana State Prison, v. The LaPorte Superior Court of LaPorte County, Indiana; James F. Gleason, Jr., as special judge of the LaPorte Superior Court of LaPorte County, Indiana.	"Temporary Writ of Prohibition.

"The Supreme Court of Indiana to the Superior Court of LaPorte County, Indiana, and James F. Gleason, Jr., Special Judge of the Superior Court of LaPorte County, Indiana.

"Whereas, the relator, Alfred F. Dowd, as Warden of the Indiana State Prison, has filed in this court his verified petition from which it appears that John Botwinski is in custody of the said Dowd, as Warden of the Indiana State Prison, by virtue of a legal commitment issued upon a valid final judgment

of the Jasper Circuit Court of Indiana, and not otherwise, and praying that a writ of prohibition issue, prohibiting the Superior Court of LaPorte County, Indiana, and James F. Gleason, Jr., as Special Judge of said Superior Court of LaPorte County, Indiana, from exercising jurisdiction or making further orders or taking any further proceedings or from hearing any further evidence or argument or from making any findings in Cause No. 13461 in said court, entitled 'John Botwinski v. Alfred F. Dowd, as Warden of the Indiana State Prison,' in which the petitioner prays a writ of habeas corpus discharging him from the custody of the respondent.

"NOW, THEREFORE, the said court and the said Special Judge thereof are hereby prohibited from asserting and taking further jurisdiction to issue a writ of habeas corpus therein, and from taking any further steps in said cause until the further order of this court. And the 18th day of June, 1941, is hereby fixed as the day on or before which the said respondent shall file his response in this court, showing cause why said order should not be made absolute.

(Signed) "Michael L. Fansler,
Chief Justice of the Supreme
Court of Indiana."

XX.

Your petitioner says that in response to said order, the LaPorte Superior Court, did on the 18th day of June, 1941, file a return to said temporary and alternative writ of prohibition, which, omitting the caption and signatures was in the following figures and words:

"Comes now the respondent and in response to the rule to show cause, and as a return to the alternative writ of prohibition issued herein, and as a return to the petition herein, this respondent says:

"1. That he was duly and legally appointed a special judge of the LaPorte Superior Court in Cause No. 13461 in said court, and as such was and is clothed with all jurisdiction in said cause as such as could be exercised by the regular judge thereof, and that he now has the right to exercise said jurisdiction.

"2. That the LaPorte Superior Court is a court of general jurisdiction and has the power to issue writs of habeas corpus upon proper petitions duly filed in said court.

"3. That cause No. 13461 filed in said court was a petition for a writ of habeas corpus in which the petitioner alleged that he was illegally restrained of his liberty in LaPorte County, Indiana, and that the LaPorte Superior Court had jurisdiction thereof.

"4. That said petition was proper in form and was duly verified.

"5. That under the Constitution of the State of Indiana and particularly under Section 27 of Article I thereof, the privilege of writ of habeas corpus cannot be abolished, and can only be suspended in case of rebellion or invasion, and then only when the public safety demands it.

"6. That relator's return and supplemental return to the petition for a writ of habeas corpus in said Cause No. 13461, in which this respondent was duly appointed and is acting as special judge, does not allege a state of rebellion or invasion, nor does it allege that the public safety has demanded the suspension of the writ of habeas corpus.

"7. The relator's return and supplemental return to the petition for writ of habeas corpus in Cause No. 13461 in the LaPorte Superior Court, in which case your respondent is acting as special judge, does not allege that the writ of habeas corpus was suspended upon the authority of the governor of the State of Indiana, nor upon the authority of any officer of the

State of Indiana who has jurisdiction to order the suspension of such writ.

"8. That the petition for writ of habeas corpus in Cause No. 13461 in the LaPorte Superior Court did not present the question of the legality of the judgment of the Jasper Circuit Court, upon which the commitment was issued by virtue of which the relator claims to hold one John Botwinski; the sole issue presented being whether the Jasper Circuit Court had jurisdiction to proceed against the petitioner in said Cause No. 13461.

"9. That the relator's return and supplemental return as respondent in said Cause No. 13461 and petitioner's traverse thereto presented issues of fact which it became the duty of this respondent as special judge in the LaPorte Superior Court to decide, said issues of fact among others being:

"a. Did the Jasper Circuit Court have jurisdiction of the person of John Botwinski at the time it purported to pronounce judgment against him?

"b. Did the Jasper Circuit Court have jurisdiction to proceed further against John Botwinski after failure to appoint an attorney for him, or to advise him of his Constitutional and legal rights?

"c. Did the Jasper Circuit Court have any further jurisdiction to proceed against one John Botwinski, the petitioner in cause No. 13461, and to pronounce judgment and issue a commitment against said John Botwinski by virtue of which the relator purports to hold said John Botwinski?

"d. Was the petitioner, John Botwinski, accorded due process of law as secured to him by the 14th Amendment to the Constitution of the United States?

"e. Were the issues presented in the petition for writ of habeas corpus by John Botwinski in Cause No. 13461 in the LaPorte Superior Court *res adjudicata* by virtue of certain proceedings in the Courts of the United States?

"f. Did the United States District Court for the Northern District of Indiana have jurisdiction to

entertain a petition for writ of habeas corpus by John Botwinski, when such petition failed to allege resort to the Courts of the State of Indiana for the relief sought in such petition?

"10. That it became the duty of this respondent to hear and determine said issues of fact so presented and it is the duty of this respondent now to determine said issues.

"11. That the petition in Cause No. 13461 in the LaPorte Superior Court duly alleged the denial of a right given to the petitioner therein by the 14th Amendment to the Constitution of the United States, and it became the duty of this respondent to decide whether or not, under the facts alleged in said petition, the petitioner therein had been denied a right guaranteed to him by the Constitution of the United States.

"12. That irrespective of whether any rights denied to a defendant by the Constitution of the State of Indiana may or may not form the basis for relief by a petition for writ of habeas corpus, this respondent was called upon to decide whether the petitioner had been denied any rights under the Constitution of the United States, and particularly whether the petitioner had been accorded due process of law, and if said due process of law had been denied whether the writ of habeas corpus was an available remedy.

"13. That by specific provision of the Constitution of the United States, and particularly by Section 2 of Article VI thereof, which states, that:

" 'The Constitution of the United States and the laws of the United States which shall be made in pursuance thereof * * * shall be the Supreme law of the land and the judges in every State shall be bound thereby; anything in the Constitution or laws of any State to the contrary notwithstanding';

and the laws of the United States provide that whenever any State detains any person in violation of the Constitution or Laws of the United States, such

person shall be entitled to a writ of habeas corpus; and it then became the duty of this respondent, as special judge of the LaPorte Superior Court, to decide whether or not the petitioner, John Botwinski, in Cause No. 13461 in said court, was restrained by the relator herein, respondent therein, in violation of the Constitution or laws of the United States.

"14. That this court has no jurisdiction, right or authority to prohibit this respondent from passing upon, and deciding a question of law duly presented under the Constitution and Laws of the United States.

"WHEREFORE, this respondent prays that the alternative writ of prohibition heretofore issued herein be dissolved; that the petition for writ of prohibition filed herein be dismissed; and for all other proper relief."

XXI.

Petitioner further says that in accordance with Rule 2-17 of the Supreme Court of Indiana, the LaPorte Superior Court, as respondent to said petition for a writ of prohibition, filed its supporting brief in the following words and figures:

"BRIEF IN SUPPORT OF RESPONDENT'S RETURN.

"The respondent believes that the writ of prohibition should not issue herein and states the reason for his belief under the following propositions:

"Proposition I.

"Whether or not the LaPorte Superior Court has jurisdiction of the subject matter of the action is determined from the law, allegations of the petition, the return and the traverse thereto.

"Pease v. State, 74 App. 572, 129 N. E. 337;

"Robertson v. State, 109 Ind. 79, 10 N. E. 582;

"People v. Brewer, 328 Ill. 472, 160 N. E. 76.

"Proposition II.

"Whenever an answer is necessary to a complaint or a return to petition for habeas corpus, then the issues formed by the petition and the return must be supported by evidence, and whenever it is necessary to support an issue by evidence, the trial court has jurisdiction to hear the evidence and determine the issues both of fact and law. A return to a writ of habeas corpus does not present questions of law but presents issues of fact and under such circumstances the trial court must determine the facts.

"49 C. J., Pg. 180, Sec. 197, Pleading;
Dickson v. Pruitt, 42 Nev. 345, 177 Pac. 11.

"Proposition III.

"The return filed by the relator herein in the habeas corpus proceeding alleged that he was holding the petitioner therein by virtue of a commitment based on a judgment of a court of competent jurisdiction; to this return a traverse was filed and under the issues thus formed, the trial court had not only the authority but the duty to inquire whether the court which rendered the judgment was a court of competent jurisdiction; such right existing in the trial court by virtue of the return, the trial court cannot be prohibited from proceeding and determining the issues of fact and law.

"Pease v. State (supra);

"Springer v. Shavender, 118 N. C. 33, 23 S. E. 976, 54 Am. St. R. 708.

"Proposition IV.

"Whatever may be the rule of law in Indiana, under the Constitution and laws of the State of Indiana it has been definitely decided by the Supreme Court of the United States, that where a petitioner has been denied counsel, and competent counsel, the court has no jurisdiction to proceed further.

"Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158;

"Johnson v. Zerbst, 304 U. S. 458, 82 L. Ed. 1461;

"Smith v. O'Grady, 61 Sup. Ct. 572, 85 L. Ed. ...

Decided Feb. 17, 1941.

"Proposition V.

"The Constitution of Indiana provides that the writ of *habeas corpus* can only be suspended in case of insurrection or rebellion, and that the statute provides jurisdiction to hear the writ lies in the court in whose jurisdiction the person is detained and that the petitioner shall be released from restraint whenever such restraint is illegal.

"*Constitution of Indiana, Art. 1, Sec. 27;*
"*Burns 1933, 3-1901.*

"Proposition VI.

"Whenever a person is denied due process of law by failure of a *nisi prius* court to appoint an attorney to defend such person and such person has not intelligently waived his right to an attorney, any proceeding thereafter is a denial of due process of law as secured by the 14th Amendment to the Constitution of the United States and the proceedings thereafter are void, and the court no longer has authority to proceed and is no longer a court of competent jurisdiction.

"*Powell v. Alabama (supra);*
"*Johnson v. Zerbst (supra);*
"*Smith v. O'Grady (supra).*

"Proposition VII.

"Upon the State Court rests the duty to secure to the petitioner for *habeas corpus* every right he is entitled to by the Constitution and laws of the United States, and the respondent in this case, as a special judge of the State Court, was required to secure to the petitioner before him all the rights he would be entitled to under the Constitution and laws of the United States.

"*Constitution of the United States, Art. 6, Sec. 2;*
"*Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791;*
"*Smith v. O'Grady, 61 Sup. Ct. (U. S.) 572, 85 L. Ed. ...*

"Proposition VIII.

"The court may not by a writ of prohibition prohibit a judge of the State Court from hearing or

determining a proper question under the Constitution and laws of the United States.

"*Constitution of the United States, Art. 6, Sec. 2.*

"ARGUMENT.

"The respondent enters this case with the knowledge that this court has heretofore in *State ex rel. Kunkle v. Circuit Court of LaPorte County,* held that a writ of prohibition should issue to prohibit the trial court from hearing a petition for writ of *habeas corpus* for the release of a prisoner for any illegality in the proceedings. However, much water has gone over the dam since that time; in addition to which the question of due process under the 14th Amendment to the Constitution of the United States is presented in this case which was not presented in the previous case. The denial of due process in the instant case is based on the proposition that the petitioner was denied counsel; that no counsel was appointed to represent him; and that no one did represent him is undisputed by the record. The question, and we think the only proper question, for the court to pass on, is: 'Was there an intelligent waiver of the right to be represented by counsel?' The legal question presented is: 'Did the denial of counsel deprive the Jasper Circuit Court, which sentenced the petitioner, of any right to proceed further?'

"Prior to the case of *Johnson v. Zerbst,* cited in this brief, the Supreme Court of the United States had always held that the denial of counsel was an error of law which must be raised on appeal and that *habeas corpus* would not lie even though time for appeal had expired. However, in *Johnson v. Herbst* the Supreme Court of the United States definitely held that a denial of the right to be represented by counsel deprived the court of jurisdiction to proceed further in the case, and that a judgment without jurisdiction was void and subject to collateral attack.

"Following this case there were several petitions for *habeas corpus* filed in the District Courts where the petitioner was imprisoned without benefit of counsel in the Federal Courts for violation of the Federal laws, and the trial courts almost universally sustained them on the authority of *Johnson v. Zerbst.*

"The question then arose whether or not the State Courts also lost jurisdiction by failure to appoint counsel. In *Achtien v. Dowd* the Circuit Court of Appeals held that:

> " 'It would seem tolerably clear that an accused is entitled, if he desires counsel, not only to be represented by one admitted to the bar, but to be represented by competent counsel,—by a capable practioner.' *Achtien v. Dowd, 117 Fed. (2d) 989.*

"The Circuit Court of Appeals in that case also held that where the appointed counsel entered a plea of guilty without his client's knowledge and agreed to stipulate facts in connection with the offense, that this was a denial of due process which would have entitled him to a writ excepting that he had not exhausted his State's remedies and the Court specifically said:

> " 'Regardless of the belief of counsel as to the action which the Indiana Supreme Court may take, upon the presentation to it, of a petition for *habeas corpus,* it was his duty * * * to first apply to the State Court for such writ * * * even though such be the belief of the petitioner and his counsel, it does not necessarily follow that the Supreme Court of Indiana will not change its holding in the light of *Johnson v. Zerbst, Avery v. Alabama, Powell v. Alabama, Walker v. Johnson,* and see also the persuasive and compelling opinion in *Smith v. O'Grady.* Even if it refused to change its views, petitioner would be in a position to apply directly to the Supreme Court for redress.'

"It would seem, therefore, that in view of the decisions of the Supreme Court of the United States, that this court should modify its opinion in the case

of *Kunkle ex rel. v. Circuit Court of LaPorte County*, or should hold that in view of the fact that petitioner has asserted a right under the Constitution and laws of the United States that the *Kunkle case (Stevenson)* is not controlling.

"Both in *Mooney v. Holohan* and in *Smith v. O'Grady*, the Supreme Court of the United States has held:

> " 'The Constitution is the supreme law of the land and upon the State Courts equally with the courts of the Union rests the obligation to guard and enforce every right security by that Constitution * * * and because a contrary conclusion would apparently mean that Nebraska provides no judicial remedy whatsoever for petitioner even though he can show he is imprisoned in violation of procedural safeguards commanded by the Federal Constitution, we are unable to reach the conclusion that *habeas corpus* is unavailable to him under Nebraska law.'

"It is petitioner's contention that he has no other available remedy. The remedy by appeal has long since expired and as was said in *Johnson v. Herbst*, the failure to take an appeal by one not represented by counsel and especially to whom counsel was denied, cannot bar him from relief, and where no other available remedy exists, he is entitled to release on *habeas corpus*.

"This court has held that *coram nobis* is not available unless the petition discloses that the petitioner is not guilty of the offense charged, but as this court said in *Batchelor v. State, 189 Ind. 69, 125 N. E. 773:*

> " 'It is suggested that the motion for leave to withdraw the plea of guilty and be permitted to plead not guilty does not allege that appellant was innocent of the crime charged, or that the crime was committed under such circumstances as would not justify the infliction of the extreme penalty of the law. The burden of making such a showing did not rest upon the appellant; it is enough for

him to show that he was denied a right to which he was entitled under the Constitution. Our law is no respecter of persons. The rights of just and upright citizens are no more sacred in the eyes of the law than the rights of the poorest and meanest citizens of the State. The safeguards erected by the Constitution are intended to protect the rights of all citizens alike. They protect the rights of the guilty as well as the rights of the innocent.'

"The respondent, as the LaPorte Superior Court, certainly had a right to inquire whether or not John Botwinski was deprived of his rights guaranteed under the Federal Constitution; whether the denial of such rights deprived the court of jurisdiction, and consequently whether the judgment upon which the commitment was issued, on which petitioner relies for the detention of said John Botwinski, was based on a judgment rendered by a court of competent jurisdiction."

XXII.

Your petitioner further says that thereafter on the 23rd day of June, 1941, the Supreme Court of Indiana resolved said temporary writ of prohibition into a permanent writ without any accompanying opinion.

XXIII.

Petitioner says that thereafter on the 12th day of August, 1941, the said LaPorte Superior Court filed in the Supreme Court of Indiana its petition for a rehearing, together with its supporting brief, in the words and figures as follows:

"PETITION FOR REHEARING.

"Comes now the respondent herein and moves the court for a rehearing in the above entitled cause for each of the following reasons:

"1. This court has failed to comply with Section 5, Article 7 of the Constitution of the State of Indiana, which provides:

" 'The Supreme Court, shall, upon the decision of every case, give a statement in writing of each question arising in the record of such case, and the decision of the Court thereon.'

"2. The decision of the court herein is contrary to law.

"3. The decision of the court herein is not supported by any evidence.

"4. There being no written opinion as required by the Constitution of the State of Indiana, it is impossible to determine the reasons supporting the court's conclusion, and a decision without an opinion is in violation of this respondent's rights under the Constitution of the State of Indiana."

"BRIEF IN SUPPORT OF PETITION FOR REHEARING.

"Since this is an original action in this court, the respondent will attach a memoranda brief to his petition for rehearing herein.

"On the 10th day of June, 1941, an alternative writ of prohibition was entered in this court in this cause with directions to the respondent to file his return on or before June 18th, 1941. On June 18th, 1941, respondent filed his return accompanied by brief. On June 20th, 1941, a copy of brief of petitioner was served on the respondent's counsel and on June 23rd, 1941, without opinion, this court purported to make the alternative writ of prohibition heretofore issued herein permanent. Section 5, Article 7, of the Constitution of the State of Indiana provides:

" 'The Supreme Court shall, upon the decision of *every case,* give a statement in writing of each question arising in the record of such case, and the decision of the court thereon.'

"In *Willets v. Ridgeway, 9 Ind. 367 and Indianapolis St. R. Company v. Taylor, 39 App. 592, 80 N. E. 436,* both this court and the Appellate Court held that this court is required to give a decision in writing upon questions as are necessary to be decided in order to finally determine the case.

"It is the respondent's contention that this provision of the Constitution is mandatory upon the Supreme Court. This court in the case of *Hunter v. Cleveland, etc., Ry. Company, 202 Ind. 328, 174 N. E. 287,* and in several cases decided in connection therewith held that the Appellate Court was required to give a written opinion in every case decided by the Appellate Court because of the Constitutional provision, and that a decision affirming a judgment '*per curiam*' amounted to no decision whatever and the case would be considered still pending in the Appellate Court unless the opinion had been certified back to the trial court, Judge Martin in that case holding:

> " 'The requirement of our Constitution in this regard is onerous and burdensome, but it was placed in our basic law to cure an abuse that had occurred, and that is apt to occur when a court of appeal is not required to give reasons for its decisions, nor even to state what the questions are which are involved and its decision thereon.'

"That it was intended to cure an abuse is indicated by the debates of the Constitutional Convention, and particularly the remarks of Thomas W. Gibson of Clark County in offering this section to the Constitution, the reasons being contained in a footnote in the *Hunter case.* Among other things, Mr. Gibson said:

> " 'The section I offer does not require of the court a long argumentative opinion—about that the judges can consult their own taste. All that it requires is that they shall, in all cases, state what they do decide, and I think that the universal experience of the bar will bear witness to the necessity of some provisions of the kind.'

"In *Willets v. Ridgway, 9 Ind. 367,* this court said:

"'Yet it is a provision not to be disregarded.'

"Respondent thinks that in this case there was clearly presented a question arising under the Constitution of the United States. The respondent believes that the Supreme Court of the United States in *Smith v. O'Grady* definitely decided that the Constitution is imperative and imposes an obligation upon the State Courts to guarantee to a petitioner all the rights that he would be entitled to under the Constitution of the United States. Respondent believes that in *Quinn v. State, 209 Ind. 316,* and in *Shipley v. State, 210 Ind. 253,* this court has held that the writ of error *coram nobis* is not available to a person such as the petitioner in the petition for writ of *habeas corpus* herein, and this respondent believes that the decision of this court without opinion is itself in violation of the Constitution of the State of Indiana.

"Petitioner, therefore, prays that a rehearing be granted herein, and that on rehearing herein the alternative writ of prohibition issued herein be ordered dissolved."

XXIV.

Petitioner says that thereafter on the 7th day of October, 1941, the Supreme Court of Indiana denied said petition for a rehearing with an accompanying opinion in the following words:

"THE STATE OF INDIANA,

"In the Supreme Court, May Term, 1941.

"On the 7th day of October, 1941, being the 116th Judicial day of said May Term, 1941.
27568.

"Hon. Michael L. Fansler, Chief Justice.

"Hon. Curtis G. Shake, Hon. Curtis W. Roll, Hon. Frank N. Richman, Hon. H. Nathan Swain, Associate Judges.

"In the case of State, ex rel. Alfred F. Dowd, as Warden of the Indiana State Prison, v. The LaPorte Superior Court of LaPorte County, Indiana, etc.	On Petition for Rehearing.

"Come the parties by their attorneys, and the court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by Fansler, C. J.

"On June 10, 1941, the relator filed a petition seeking a writ prohibiting the respondent from issuing a writ of *habeas corpus* on the petition of one John Botwinski.

"It appears without controversy that Botwinski was charged with bank robbery in the Jasper Circuit Court, a court of general criminal jurisdiction; that he entered a plea of guilty; that there was a judgment finding him guilty; and that he was sentenced to the Indiana State Prison, and a commitment, regular in form, issued on said judgment, and that he was held by the relator under said judgment. These facts were fully disclosed and were not controverted in the trial court. It was the petitioner's contention that the judgment was void because he was deprived of the services of an attorney at the time of his arraignment, and had no attorney at the time he entered his plea of guilty. On the filing of the original action in this court, a temporary writ issued, and, after a return, which did not controvert these facts, the writ was made permanent by an order of this court entered on June 23, 1941, without an opinion.

"On petition for rehearing, the respondent points to section 5 of article 7 of the Constitution of Indiana, which provides: 'The Supreme Court shall, upon the decision of every case, give a statement in writing of each question arising in the record of such case, and the decision of the Court thereon,' and asserts that the court erred in failing to file a written opinion upon final disposition of the case. It has been concluded that the respondent is right in his contention, and that the constitutional provision requires an opinion in writing in original actions as well as in appeals.

"Courts of a county in which a State Prison is located have no jurisdiction to issue writs of *habeas corpus* in an action against the warden on behalf of a prisoner held upon a writ issued in execution of a judgment by a court of general criminal jurisdiction where the judgment and commitment are regular upon their face; and it is the duty of such courts to refuse to exercise jurisdiction, and to dismiss the petition when it is made to appear that the petitioner is held under such a proceeding. If the trial court which rendered the judgment upon which the commitment is based committed error in depriving the defendant of some constitutional right, the remedy is in the court rendering the judgment, or by appeal to this court. This rule has been announced so often, so clearly and so emphatically, that another opinion announcing it should not reasonably seem necessary. Another opinion can add no light for the guidance of bench and bar. The earlier cases are collected in *State ex rel. Kunkel et al. v. Circuit Court of LaPorte County (1936), 209 Ind. 682, 200 N. E. 614,* and the rule is announced again in *Swain v. Dowd, Warden (1939), 215 Ind. 256, 18 N. E. (2d) 928.*

"But it is contended that the petitioner had no remedy by motion for a new trial or *coram nobis* proceeding. If so, it must be chargeable to his own inexcusable neglect, since otherwise there is oppor-

tunity to correct error by one method or the other. The question of whether or not the committing court committed error can be of no concern to the LaPorte Superior Court, since it has no jurisdiction to determine whether there was error.

"The petition for rehearing is denied."

XXV.

Petitioner says that he was not made a party to the proceedings in the Supreme Court of Indiana, and for that reason does not have a right to appeal to this court to review the judgment of the Supreme Court of Indiana; that the LaPorte Superior Court has no interest in taking any appeal to this court from the judgment of the Supreme Court of Indiana since the *nisi prius* court of a State is compelled to follow the judgment of the Supreme Court of the State and consequently has no right to appeal; and that this petitioner has no right to compel the LaPorte Superior Court to prosecute an appeal to this court.

XXVI.

Petitioner says that by virtue of the writ of prohibition issued by the Supreme Court of Indiana against the Superior Court of LaPorte County in said cause number 27568 he has exhausted all of his remedies in the courts of the State of Indiana and has no relief except by a petition for a writ of *habeas corpus* to the courts of the United States and to this court, and that no remedy exists to relieve him from the void judgment entered against him in the Jasper Circuit Court in the State of Indiana except only by this action.

XXVII.

Petitioner says that this court should take jurisdiction of this petition for the reason that your petitioner and all persons similarly situated are now prevented by the action of the Supreme Court of Indiana from prosecuting an appeal to this court by the regular channels of legal procedure for the reason that the trial courts are prohibited from entertaining a petition for a writ of *habeas corpus* even though there be an absolute failure of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States; and that this court ought to finally declare the law for the guidance of the Supreme Court of the State of Indiana and the *nisi prius* courts in said State; petitioner invokes the jurisdiction of this court under the provisions of Title 28, Secs. 451, 452 and 453, U. S. C. A., providing for original jurisdiction in this court in certain proceedings in *habeas corpus*.

WHEREFORE, your petitioner prays that a writ of *habeas corpus* issue herein, directed to the respondents; that the court hear the evidence on this petition or in the alternative that this court appoint a commissioner to hear the evidence; and that upon a final hearing, the writ of *habeas corpus* be made absolute, and your petitioner be restored to his liberty.

John Botwinski,
Petitioner.
Oscar B. Thiel,
Attorney for Petitioner.

Business Address:
504 Broadway,
Gary, Indiana.

State of Indiana,
County of Laporte—ss.

JOHN BOTWINSKI, being first duly sworn upon his oath, says: That he has read the above and foregoing petition together with the exhibits thereto attached, that he know the contents thereof, and that the same is true in substance and in fact as this affiant is informed and verily believes.

John Botwinski.

Subscribed and sworn to before me
this 3rd day of December, 1941.

Oscar B. Thiel,
Notary Public.

My commission expires: September 20, 1945.
(Seal.)

Petitioner's Exhibit A.

"PETITION FOR WRIT OF HABEAS CORPUS.

"State of Indiana,
County of LaPorte—ss.

In the LaPorte Superior Court.

"John Botwinski, Petitioner, v. Alfred F. Dowd, as Warden of the Indiana State Prison, Respondent.	Cause No. 13461.

"TO THE JUDGE OF THE LaPORTE SUPERIOR COURT:

"Comes now the petitioner and presents to the court:

I.

"That the petitioner herein is now confined in the Indiana State Prison at Michigan City, Indiana, and has been so confined since the 27th day of January, 1938.

II.

"That previous to said confinement your petitioner was a citizen of the United States residing in East Chicago, Indiana.

III.

"That the sole claim and authority by virtue of which the respondent as warden of the Indiana State Prison restrains and detains your petitioner of his liberty is by a commitment issued and based upon a judgment purported to have been issued by the Jasper Circuit Court and entered on the 27th day of January, 1938, in which said Jasper Cicruit Court and the judge thereof purported to find your petitioner

guilty of the crime of bank robbery upon an affidavit theretofore filed in the said Jasper Circuit Court, and upon which said finding of guilty the judge of the Jasper Circuit Court purported to sentence your petitioner for a period of sixty-five (65) years in the Indiana State Prison at Michigan City, Indiana; that pursuant to a commitment issued thereon, your petitioner was delivered into the custody of the respondent where he is now restrained of his liberty in the Indiana State Prison.

IV.

"Your petitioner says that said judgment of conviction is void and that the commitment issued thereon is void for the following reasons:

"a. That your petitioner was arrested on the 22nd day of January, 1938, in the City of Chicago, Illinois, and immediately thereafter was brought from the said City of Chicago, Illinois, to the City of Hammond, Indiana.

"b. That upon being placed in the city jail in Hammond, Indiana, your petitioner requested the said jailer to give him time to confer with an attorney and informed the said jailer that he had a brother-in-law living in East Chicago, Indiana, who would get in touch with his attorney for him.

"c. That before being given an opportunity to confer with any attorney, your petitioner was taken from the said city jail in Hammond, Indiana, to the Jasper County Court House in Rensselaer, Indiana, and was by the court required to plead to the charge then filed against him.

"d. Your petitioner says that upon being brought into the Jasper Circuit Court he informed the court that he had an attorney coming from Chicago and he would like to have time to confer with said attorney before entering his plea therein, but that he was not given any opportunity by the court to confer with any attorney.

"e. Your petitioner further says that neither the court nor the prosecuting attorney advised your petioner of the nature of the charge filed against him

or the punishment that might be imposed therefor, and that he was not informed by the court of his right to have counsel for his defense, and of his right to a trial by jury, and of his right not to give testimony against himself, and that the said Jasper Circuit Court and the prosecuting attorney in the said Jasper Circuit Court entirely failed to advise your petitioner of any of his constitutional rights.

V.

"Your petitioner further says that he had no legal education whatever; that the extent of his education was a second grade education in the Wisconsin public schools; that he could read and write but that he had no legal experience and was unable to protect his rights in any legal proceeding.

VI.

"That the father of your petitioner lives and at the time lived in Dancy, Wisconsin, approximately four hundred (400) miles from the place where the charges were filed against your petitioner, and that your petitioner was unable to get into communication with his father before the proceedings held in the Jasper Circuit Court.

VII.

"Your petitioner further says that he was induced to enter a plea of guilty by the promises and representations of the Indiana State Police who had caused his arrest and who had brought him to Rensselaer, Indiana, that if he would enter a plea of guilty he would get a maximum sentence of not more than ten (10) years and might even be given a suspended sentence because he had no previous prison record of any kind.

VIII.

"Your petitioner further says that after he was so brought into court, and after his plea had been entered, the brother-in-law of your petitioner appeared in the Jasper Circuit Court together with one Ettore Farreri, an attorney of Chicago, Illinois, and that they asked the court for permission to confer with

your petitioner, which permission was by the court at the time denied.

IX.

"That after the hearing of the case was concluded, the court permitted your petitioner to confer with Mr. Ettore Farreri but that the court refused to recognize said Ettore Farreri as an attorney for your petitioner.

X.

"That immediately after said conference, the said Ettore Farreri on behalf of your petitioner asked the court to be permitted to withdraw the plea of guilty entered by your petitioner and to enter a plea of not guilty but that said request was by the court denied.

XI.

"Your petitioner further says that the Jasper Circuit Court refused to permit your petitioner to confer with any attorney prior to his plea and to the purported hearing and trial, and denied your petitioner any opportunity to confer with either an attorney selected by your petitioner or with any attorney appointed by the court, and that he was compelled to submit to judgment and sentence without any time to prepare for any hearing, without advice of counsel, without being informed of his right to counsel, and with counsel having been specifically denied to your petitioner.

XII.

"Your petitioner says that all of said acts of the Jasper Circuit Court were in violation of the rights of your petitioner as guaranteed to your petitioner under the Constitution of the State of Indiana, and particularly under Sections 13 and 14 of Article I of said Constitution of the State of Indiana, and that he is now being detained and deprived of his liberty in violation of the 14th Amendment to the Constitution of the United States in that all of the proceedings hereinabove set out were without due

process of law, and that the action of the court in so pretending to give your petitioner a hearing and issuing your petitioner of his liberty without due process of law, and that the respondent herein in response to said commitment so issued by the Jasper Circuit Court is depriving your petitioner of his liberty without due process of law.

"WHEREFORE, your petitioner asks that a writ of habeas corpus issue herein directed to the respondent as warden of the Indiana State Prison, and that upon a hearing on said petition, said writ of habeas corpus may be made permanent and your petitioner be restored to his liberty.

"s/ Oscar B. Thiel,
Attorney for Petitioner.

"State of Indiana,
County of Lake—ss.

"OSCAR B. THIEL, being first duly sworn upon his oath, says: That he is the attorney for the petitioner in the above and foregoing petition and makes this affidavit for and on behalf of said petitioner; that he has read and knows the contents thereof, and that the matters and things therein contained are true in substance and in fact as he is informed and verily believes.

"s/ Oscar B. Thiel.

"Subscribed and sworn to before me
this 18th day of April, 1941.

"s/ Frank A. Rondinelli,
Notary Public.

(Seal.)
"My commission expires June 16, 1942."

Petitioner's Exhibit B.

"RETURN OF WRIT OF HABEAS CORPUS.

"State of Indiana,
County of LaPorte—ss.

In the LaPorte Superior Court.
March Term, 1941.

"John Botwinski, Petitioner, v. Alfred F. Dowd, as Warden of the Indiana State Prison, Respondent.	Cause No. 13461.

"Comes now the respondent herein, Alfred F. Dowd, as Warden of the Indiana State Prison, by his attorneys, George N. Beamer, Attorney-General of Indiana, Norman E. Duke and John R. Walsh, Deputy Attorneys-General, and for a return and answer to the writ of habeas corpus heretofore issued in this cause, says that he is now the Warden of the Indian State Prison and that he was such Warden at the time the writ of habeas corpus in the above entitled cause was issued and, as such Warden, he has the custody of the petitioner herein.

"For a further return and answer to said writ of habeas corpus the said respondent states:

"First. The authority or cause of the restraint of the petitioner in the custody of respondent herein is a valid commitment in due form, issued by the Circuit Court of Jasper County, Indiana, the same being a court of competent jurisdiction. Said commitment was duly issued upon a judgment legal and valid, wherein it was found that the petitioner, John Botwinski, is guilty of the crime of bank robbery, and that he is imprisoned in the Indiana State Prison for a period of sixty-five years.

"Second. A copy of the original commitment is returned herewith, said copy being attached hereto, made a part hereof, and marked Respondent's Exhibit A.

"Third. That said respondent has the petitioner in his custody and under his restraint, and that he has not transferred him to any other person than the respondent herein.

"s/ George N. Beamer,
Attorney-General of Indiana.
"s/ Norman E. Duke,
"s/ John R. Walsh,
Deputy Attorneys-General,
Attorneys for Respondent.

"State of Indiana,
County of LaPorte—ss.

"Alfred F. Dowd, being first duly sworn upon his oath, says that he is the Warden of the Indiana State Prison and respondent in the within entitled cause; that he has read the foregoing Return and Answer and that the facts contained therein are true to the best of his knowledge and belief.

"s/ Alfred F. Dowd.

"Subscribed and sworn to before me
this 7th day of May, 1941.

"s/ Edgar Wetzel,
Notary Public.

(Seal.)

"My commission expires June 10, 1942.

"CERTIFIED COPY OF ORIGINAL COMMITMENT.

"State of Indiana,
Jasper County—ss.

The Jasper County Circuit Court.

January Term, 1938.
January 27, 1938.

"To the Sheriff of Jasper County, Greeting:

"BE IT REMEMBERED, that heretofore, to-wit: At a term of the Circuit Court of Jasper County, in the State of Indiana, begun, holden and continued at the Court House in the City of Rensselaer, on the 27th day of January, 1938, the same being the 16th judicial day of the January, then, A. D. 1938, of the said Circuit Court of Jasper County, before the Honorable ....., sole Judge thereof, the following proceedings were had in the cause of

"The State of Indiana,
v.
John Botwinski.
} No. 2587.
Crime Bank Robbery.

"Comes now the State of Indiana, by John E. Hopkins, Prosecuting Attorney; comes also the defendant in person and the court finds that the defendant, John Botwinski, is 33 years of age, and that said defendant is guilty of the crime charged, namely: Bank Robbery.

"It is by the court, therefore, ordered and adjudged that the said defendant for the offense by him committed, do make his fine to the State of Indiana in the penal sum of no dollars, that he is imprisoned in the INDIANA STATE PRISON for a period of sixty-five (65) years and be disfranchised and rendered incapable of holding any office of trust or profit for a term of 50 years and that he pay and satisfy the cost and charges herein, taxed at $28.70.

"The Sheriff of said Jasper County is hereby charged with the due execution of the foregoing judgment.

"s/ Moses Leopold,
Judge.

(Seal.)

"State of Indiana,
Jasper County—ss.

"I, Sam Roth, Clerk of the Circuit Court of Jasper County, in the State of Indiana, do hereby certify that the foregoing is a true and complete copy of the judgment of said court in the above entitled cause, on the day and year first aforesaid, as appears on record in my office.

"IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Circuit Court of Jasper County, at my office in the City of Rensselaer this 27th day of January, 1938.

"Clerk Circuit Court of Jasper County,
By s/ M. W. Roth,
Deputy.

"State of Indiana,
County of LaPorte—ss.

"I, E. H. Taylor, Clerk of the Indiana State Prison, Michigan City, Indiana, do hereby certify that the above and foregoing is a true and complete copy of the judgment of the Jasper Circuit Court as appears of record in my office.

"IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the Indiana State Prison, at my office in the City of Michigan City, Indiana, on this 7th day of May, 1941.

"s/ E. J. Taylor,
Clerk, Indiana State
Prison."

STATEMENT AS TO JURISDICTION.

The petitioner files herewith his statement showing the basis on which he contends that the Supreme Court has jurisdiction in this cause, as follows:

1. Jurisdiction of the Supreme Court is invoked under Sections 451, 452 and 453, of Title 28, of the United States Code Annotated.

2. The opinion of the Supreme Court of Indiana, in which it is disclosed that this petitioner has exhausted his legal remedies in the State of Indiana, is not officially reported but is reported in *36 N. E. (2d) 765*, in the cause entitled *Alfred F. Dowd, as Warden, etc., v. The Superior Court of LaPorte County.*

3. This petitioner was not made a party to said proceeding and consequently cannot appeal; however, the Superior Court of LaPorte County did file a petition for rehearing, which rehearing was denied on October 7, 1941.

4. It is the contention of this petitioner that the action of the Warden of the Indiana State Prison, and of the *nisi prius* and Supreme Court of Indiana, has deprived your petitioner of his liberty without due process of law as is guaranteed to him by the 14th Amendment to the Constitution of the United States.

5. For the purpose of disclosing that your petitioner has exhausted his legal remedies, your petitioner says: That on the 23rd day of April, 1941, he filed his petition for writ of habeas corpus in the LaPorte Superior Court in the State of Indiana, alleging that he was being de-

prived of his liberty without due process of law in violation of the 14th Amendment to the Constitution of the United States; that a hearing was had on said petition and evidence heard; that thereafter, on the 10th day of June, 1941, the Supreme Court of Indiana issued a temporary writ of prohibition prohibiting the trial court from proceeding further in said habeas corpus hearing; that on the 23rd day of June, 1941, said temporary writ of prohibition was made permanent, and that a petition for rehearing was denied on October 7, 1941.

6. That in said cause there was drawn in question and duly presented a question arising under the Constitution of the United States, in which it was contended that your petitioner was being deprived of his liberty without due process of law in violation of the 14th Amendment to the Constitution of the United States for the purpose of obtaining relief in the courts of the State of Indiana.

7. The cases believed to sustain the jurisdiction of the Supreme Court are as follows: *Ex Parte Hudgins, 249 U. S. 378; Moore v. Dempsey, 261 U. S. 86; Johnson v. Zerzst, 304 U. S. 458; Smith v. O'Grady (1941), 61 Sup. Ct. 572.*

8. The statute authorizing jurisdiction in this court is:

U. S. C. A. 28, Secs. 451, 452 and 453.

9. The cases believed to sustain the proposition that petitioner has been deprived of his liberty without due process of law are: *Powell v. Alabama, 287 U. S. 45; Johnson v. Zerbst, 304 U. S. 458; Smith v. O'Grady, 61 Sup. Ct. 572.*

10. The cases holding that jurisdiction will be exercised where exceptional circumstances exist are: *Ex*

Parte Hudgins, 249 U. S. 378; Mooney v. Holohan, 294 U. S. 103; Moore v. Dempsey, 261 U. S. 86.

11. The cases in the Supreme Court of Indiana holding that petitioner has exhausted his legal remedies under the the state laws are *Dowd, Warden, v. Superior Court of LaPorte County, 36 N. E. (2d) 765; Jones v. Dowd, 37 N. E. (2d) 68; State ex rel. O'Leary v. Smith, 37 N. E. (2d) 61; Kunkle, Warden, v. Circuit Court of LaPorte County, 209 Ind. 682, 200 N. E. 614; Swain v. Dowd, Warden, 215 Ind. 256, 18 N. E. (2d) 928.*

Respectfully submitted,

OSCAR B. THIEL,
Attorney for Petitioner.